

IN THE SUPREME COURT OF THE STATE OF NEVADA

TKNR, INC., a California corporation,

Appellant,

vs.

WLAB INVESTMENT, LLC,

Respondent.

Supreme Court Case No. 85620

District Court Case No. A-18-785917-C
Electronically Filed
Aug-08-2023 04:23 PM
Elizabeth A. Brown
Clerk of Supreme Court

Appeal from the Eighth Judicial District Court
District Court Case No. A-18-785917-C
Adriana Escobar, District Judge

RESPONDENT ANSWERING BRIEF

KAEMPFER CROWELL
Lesley Miller, No. 7987
Elva Castaneda, No. 15717
1980 Festival Plaza Drive, Suite 650
Las Vegas, Nevada 89135
Telephone: (702) 792-7000
Facsimile: (702) 796-7181
Email: lmiller@kcnvlaw.com
Email: ecastaneda@kcnvlaw.com

Attorneys for Respondent WLAB Investment, LLC

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made so that the judges of this Court may evaluate possible conflicts of interest.

1. Respondent WLAB Investment, LLC is a Nevada limited liability company licensed to conduct business in the State of Nevada. It has no parent corporation, and no entity owns 10% or more of its stock.

2. The law firm of Kaempfer Crowell has represented WLAB Investment, LLC since March of 2023—in this Court. Benjamin B. Childs previously appeared for WLAB Investment, LLC during this case.

KAEMPFER CROWELL



Lesley B. Miller, No. 7987
Elva A. Castaneda No. 15717
1980 Festival Plaza Drive, Suite 650
Las Vegas, Nevada 89135

Attorneys for Respondent
WLAB Investment, LLC

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT	7
ROUTING STATEMENT	7
ISSUES FOR REVIEW	7
STATEMENT OF THE CASE.....	7
STATEMENT OF FACTS	8
SUMMARY OF AGUMENT.....	10
ARGUMENT	11
I. Standard of Review.....	11
II. The District Court Did Not Abuse Its Discretion In Denying Appellant TKNR's Motion for Attorneys' Fees.	12
A. The District Court properly denied TKNR's request for fees and costs under Rule 11.	12
B. The District Court properly determined that TKNR's request for attorney fees was untimely.	14
C. The District Court properly denied the attorney fees based on the Residential Purchase Agreement, as untimely.	15
III. The District Court Did Not Abuse Its Discretion By Denying Appellant TKNR's Motion for Attorneys' fees.	16
CONCLUSION	17
CERTIFICATE OF COMPLIANCE.....	18
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

CASES

<i>Barbara Ann Hollier Tr. v. Shack</i> , 131 Nev. 582, 587, 356 P.3d 1085, 1088 (2015).....	17
<i>Barber v. Miller</i>	12
<i>Barber v. Miller</i> , 146 F.3d 707, 710 (9th Cir. 1998)	12
<i>Brunzell</i>	16
<i>Nelson v. Peckham Plaza P'ships</i> , 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994).....	10, 15
<i>Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.</i>	12
<i>Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.</i> , 174 F.3d 87, 94 (2 nd Cir. 1999)	12
<i>Radcliffe</i> at 788	13
<i>Radcliffe v. Rainbow Constr. Co.</i> , 254 F.3d 772, 789 (9 th Cir. 2001)	12
<i>Shuette v. Beazer Homes Holdings Corp.</i> , 121 Nev. 837, 865, 124 P.3d 530, 549 (2005).....	16
<i>State v. Eighth Judicial Dist. Court (Armstrong)</i> , 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011)	12
<i>Young v. Johnny Ribeiro Bldg., Inc.</i> , 106 Nev. 88, 93–94, 787 P.2d 777, 780 (1990).....	16
<i>Young v. Johnny Ribeiro Bldg., Inc.</i> , 106 Nev. 88, 93-94, 787 P.2d at 777, 779 (1990).....	17

STATUTES

NRS § 17.117	9, 11, 12, 15
NRS § 18.010	9, 12, 15
NRS § 18.010(2)(a)	11
NRS § 18.010(2)(b)	10, 15
NRS Chapter 113	9

RULES

Nev. R. Civ. P 54(d)(2)(B)(i)(ii)	14, 15, 16
Nev. R. Civ. P. 11(c)(1)(a)	11
Nev. R. Civ. P. 68	9
NRAP 17(b)(5)	6
NRAP 26.1(a)	2
NRAP 28(e)(1)	17
NRAP 32(a)	17
NRAP 32(a)(5)	17
NRAP 32(a)(6)	17
NRAP 32(a)(7)	17
NRAP 32(a)(7)(C)	17
NRAP 3A	6
NRAP 4(a)	6
NRCP 11(c)(2)	12

NRCP 54(d)(B)(i)	10, 13
NRCP 56(f)	8
NRCP 68	7, 10, 13
Rule 11	passim
Rule 11(b).....	11

JURISDICTIONAL STATEMENT

This Court has jurisdiction under NRAP 3A because the district court's summary judgment decision was a final judgment that disposed of all pending claims and issues. TKNR, Inc.'s ("TKNR") appeal was timely under NRAP 4(a) because they filed the notice of appeal within 30 days after notice that a final judgment was entered. RA000354-0399. Their appeal of the attorney fee award was timely for the same reasons. RA000630-0759.

ROUTING STATEMENT

The Court of Appeals should retain and decide this appeal under NRAP 17(b)(5) because this case involves attorney fees.

ISSUES FOR REVIEW

1. Whether the District Court erred in denying Appellant TKNR's Motion for Attorneys' Fees.
2. Whether the District Court abused its discretion by denying appellant TKNR's Motion for Attorneys' fees.

STATEMENT OF THE CASE

This is an appeal from the district court's denial of TKNR's Motion for Attorney's Fees and Costs (the "Motion for Fees"). RA000001-020. TKNR seeks to recover attorney's fees and costs after the Supreme Court affirmed a decision granting TKNR Defendant's Motion for Summary Judgment. RA000021-028. The lower court denied the Motion for Fees because TKNR took over 400 days to request the fees and costs, in violation of the 21-day deadline under Rule NRCP 54(d)(2)(B)(i)(ii). The Motion for Fees was properly denied on this basis,

ordering that TKNR failed to meet the procedural requirements of Rule 11 which requires any motion for sanctions be served at least 21 days before filed with the court and made separately from any other motion and pursuant to NRS § 18.010, NRS § 17.117, NRCP 68, which require attorney's fees be filed within 21 days of a notice of entry of judgment. Additionally, the TKNR Defendants filed a supplement to their original Motion for Fees under the terms of the Parties' Residential Purchase Agreement (the "Agreement"), however the lower court denied this request as untimely as Defendants failed to mention the Agreement in its original Motion for Fees nearly two years before the supplement. RA000029-046.

This court reviews a lower court's denial of a motion for fees and costs under an abuse of discretion standard. The lower court did not abuse its discretion in denying fees because it considered all relevant factual and legal issues including but not limited to the Motion for Attorney's Fees, the Supplement to Defendants' Motion for Attorney's Fees, the Opposition and oral arguments made at the time of hearing.

STATEMENT OF FACTS

WLAB filed its initial complaint on December 11, 2018 against the TKNR Defendants for: (1) Recovery under NRS Chapter 113; (2) Construct Fraud; (3) Common Law Fraud; and (4) Fraudulent Inducement. AA I, 000001-8. After two (2) years of litigation, the TKNR Defendants filed their Summary Judgment, or in the alternative, Partial Summary Judgment. RA000047- RA000187. In the TKNR Defendants' original Motion for Attorney's Fees which was incorporated in their December 15, 2020, Motion for Summary Judgment, the TKNR Defendants

petitioned the District Court for attorney's fees pursuant to Rule 11 and NRS § 18.010(2)(b). *Id.* WLAB filed a timely Opposition as well as a Countermotion for continuance based on NRCP 56(f), and a Countermotion for Imposition of Monetary Sanctions. RA000188-RA000353.

On March 11, 2021, a hearing was held regarding the TKNR Defendants' Motion for Summary Judgment. AA IV, 000734-776. The Court granted Summary Judgment as to all claims and awarded the TKNR Defendants attorney's fees as well as Rule 11 Sanctions. *Id.* On March 31, 2021, the original order granting summary judgment in favor of the TKNR Defendants was filed along with a hearing to show cause related to the violation of Rule 11 by WLAB. RA000354-0399. However, the court unilaterally amended the original order, removing the order to show cause language, instead requesting the TKNR Defendants to file an affidavit in support of the requested attorney's fees and costs. *Id.* The TKNR Defendants filed the Affidavit in support of Attorneys' Fees and Costs indicating that the requested fees and costs were appropriate under either Rule 11 or for abuse of process. AA IV, 000621-733.

On April 16, 2021, WLAB filed a Motion to Reconsider the Amended Order. RA000400-0578. The Court granted in part and denied in part WLAB's Motion. RA000622- RA000629. On May 25, 2021, Judgment was entered awarding the TKNR Defendants the sum of \$128,166.78 in attorneys' fees and costs from WLAB. RA000622-0629.

WLAB later filed a Notice of Appeal arguing that factual issues existed which precluded the District Court from granting summary judgment. WLAB

further argued that this matter did not warrant Rule 11 sanctions. RA000630-0759. On May 12, 2022, the Nevada Supreme Court affirmed in part and reversed in part the TKNR Defendants' Motion for Summary Judgment. RA000021-028. The Nevada Supreme Court found that issues of fact did not exist in the record and affirmed the District Court's granting of summary judgment. In regards to the Rule 11 sanctions, the Nevada Supreme Court found that the TKNR Defendants' had not complied with Rule 11 procedural rules. Id. The Court concluded that the District Court imposed sanctions without first giving the offending party notice and reasonable opportunity to respond. Id. As such, the Court reversed the award of the TKNR Defendants' attorney's fees. On August 16, 2022, the Remittitur was filed with the Court. RA000760-0763.

The TKNR Defendants subsequently filed a Motion for Attorneys' Fees arguing that recovery of attorneys' fees and costs is appropriate under NRS § 18.010(2)(a), NRS § 17.117, Nev. R. Civ. P. 68. RA000001- RA000020. The TKNR Defendants later filed a Supplement arguing they were entitled to attorney fees under the Residential Purchase Agreement entered into between the parties. RA000029- RA000046. The Court denied both the Motion for Attorneys' Fees and the Supplement. RA000925-RA000932. The instant appeal followed.

SUMMARY OF AGUMENT

The district court properly denied the motion for attorney's fees and the corresponding supplement. There was not procedural defect that prevented the district court's denial of the motion. On the merits, the district court correctly concluded that the request for attorney's fees and costs under Rule 11 was not

appropriate because TKNR failed to follow procedural requirements, not only failing to file the motion for sanctions separately but also failing to provide the targeted party of Rule 11 sanctions an opportunity to respond. Additionally, the Court found that pursuant to NRCP 54(d)(B)(i), TKNR's Motion for Attorney Fees and Costs pursuant to NRS § 18.010, NRS § 17.117, NRCP 68, and the Residential Purchase Agreement was denied as untimely. Specifically, "The TKNR Defendants have argued for the first time, over 400 days after notice of entry of judgment, that they are entitled to fees pursuant to NRS § 17.117 and NRCP 68. The 21-day window to file a motion for attorney fees under NRCP 54(d)(B)(i) had passed. Therefore, the TKNR Defendants' request for attorney fees pursuant to NRS § 18.010, NRS § 17.117 and NRCP 68 was denied as untimely." Further, the District Court reasons that, "the TKNR Defendants did not mention The Residential Purchase Agreement entered into between both parties as a ground that entitled them to attorney fees when they filed their original motion on December 15, 2020," and the request is untimely.

ARGUMENT

I. Standard of Review

Eligibility for attorney fees is reviewed de novo, but a district court's award of attorney fees where such an award is authorized by statute, contract or rule will not be disturbed absent a manifest abuse of discretion. *Nelson v. Peckham Plaza P'ships*, 110 Nev. 23, 26, 866 P.2d 1138, 1139–40 (1994). A manifest abuse of discretion occurs when there is a clearly erroneous interpretation or application of the law, and "[a]n arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than reason, or contrary to the evidence or established

rules of law." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (internal citations and quotation marks omitted).

II. The District Court Did Not Abuse Its Discretion In Denying Appellant TKNR's Motion for Attorneys' Fees.

A. The District Court properly denied TKNR's request for fees and costs under Rule 11.

Rule 11 requires any motion for sanctions to be made "separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b)." Nev. R. Civ. P. 11(c)(1)(a). The motion must describe the specific conduct that allegedly violates section 11(b). *Id.* The requirement of a separate Rule 11 motion is mandatory. *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 789 (9th Cir. 2001). A request for Rule 11 sanctions cannot be contained within any other motion. *Id.* The court in *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, rejected defendants' argument to treat their affidavit of service and reply affidavit as a motion for Rule 11 sanctions because a motion must "be made separately from other motions or requests." *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 94 (2nd Cir. 1999). In *Barber v. Miller*, the court acknowledged that defendant gave plaintiff multiple warnings but concluded that such warnings were not motions "and the Rule requires service of a motion." *Barber v. Miller*, 146 F.3d 707, 710 (9th Cir. 1998).

The Rule 11 motion must be served on opposing counsel but not filed with the court. *Id.* This is the 21-day "safe harbor" provision, which allows the targeted attorney and party the opportunity to correct or withdraw the alleged

wrongful claim or assertion. The 21-day safe harbor provision is also considered a mandatory step. *Radcliffe* at 788.

Here, TKNR's Motion for Rule 11 sanctions was combined with their motion for attorney's fees. TKNR's Motion further failed to describe WLAB's specific conduct that allegedly violated this rule. WLAB was served on August 10, 2022, with the TKNR Defendants' Motion for Attorney Fees. WLAB had not, prior to filing the motion, been served with TKNR's Motion for Rule 11 sanctions. WLAB was served a second time with TKNR's filed Motion for Attorney's Fees on August 22, 2022. This again violated the procedural requirements of NRCP 11(c)(2) requiring a 21-day safe harbor before a motion for Rule 11 sanctions.

Furthermore, the Nevada Supreme Court had specifically found that the TKNR Defendants' Motion For Rule 11 Sanctions did not meet the rule's "Mandatory procedural requirements" and reversed the district court's order awarding attorney fees:

In particular, respondents did not serve notice of their motion at least 21 days before they filed the motion with the district court and the motion was not made separately from their summary judgment motion as required by NRCP 11(c)(2).

See RA000021-028 Supreme Court Order, May 12, 2022, p.7

As the targeted party of Rule 11 sanctions, WLAB should have been given an opportunity to respond. In this case, no such opportunity was given and TKNR failed to follow Rule 11 procedures. Therefore, the TKNR Defendants' request for attorney fees under Rule 11 should be denied.

B. The District Court properly determined that TKNR's request for attorney fees was untimely.

NRCP 54(d)(B)(i) states that a motion for attorney fees must be filed within 21 days of notice of entry of order of judgment. Here, TKNR in their December 15, 2020, Motion for Summary Judgment, requested attorney fees pursuant to NRS § 18.010(2)(b) and Rule 11. The then-presiding Judge chose to award attorney fees pursuant to Rule 11. The TKNR Defendants did not appeal the denial of their request for fees pursuant to NRS § 18.010(2)(b). The TKNR Defendants instead decided to request fees pursuant to NRS § 18.010(2)(b), over one year post judgment. Therefore, pursuant to NRCP 54(d)(B)(i), TKNR's Motion for Attorney's Fees based on NRS § 18.010, NRS § 17.117 and NRCP 68 was denied as untimely.

In the TKNR Defendants' Motion for Summary Judgment, TKNR argued they were entitled to attorney fees based on Rule 11 and NRS § 18.010(2)(b). *See* RA000021-028 TKNR's Motion for Summary Judgment, pp. 30-31. TKNR never requested fees pursuant to NRS § 17.117 or NRCP 68. *Id.* TKNR argued for the first time, over 400 days after notice of entry of judgment, that they were entitled to fees pursuant to NRS § 17.117 and NRCP 68. Under NRCP 54(d)(B)(i), the 21-day window to file a motion for attorney fees had passed. Therefore, the TKNR Defendants' request for attorney fees pursuant to NRS § 18.010, NRS § 17.117 and NRCP 68 was appropriately denied.

C. The District Court properly denied the attorney fees based on the Residential Purchase Agreement, as untimely.

On August 25, 2022, TKNR filed a supplement to their original Motion arguing that, pursuant to the terms of the Residential Purchase Agreement signed by the parties in this matter, TKNR is entitled to their attorney fees and costs. The Supplement included citation to the provision of the Residential Purchase Agreement between the Parties that provide for recovery of attorney's fees and costs by the prevailing party.

Here, TKNR had 21 days to file their Motion for Attorney Fees to specify "the judgment and the statute, rule, or other grounds entitling the movant to the award." Nev. R. Civ. P 54(d)(2)(B)(i)(ii). TKNR filed this supplement to their original Motion for Attorney Fees approximately a year and a half after notice of the entry of judgment. TKNR did not mention the Residential Purchase Agreement entered into between both parties as a ground that entitled them to attorney fees when they filed their original motion on December 15, 2020. TKNR's request for attorney fees based on the supplement filed on August 25, 2022 was untimely under NRCP 54(d)(2)(B)(i)(ii). Therefore, the Motion for Attorney Fees and Costs pursuant to the Residential Purchase Agreement was appropriately denied.

TKNR's Motion for Attorney Fees and Costs was untimely; therefore, it is clear that the District Court did not abuse its discretion when denying TKNR's motion for attorney fees and cost.

III. The District Court Did Not Abuse Its Discretion By Denying Appellant TKNR's Motion for Attorneys' fees.

The District Court's denial of TKNR's request for attorney's fees and costs are not subject to any legitimate possibility of reversal because the Nevada Supreme Court has ruled that a District Court's discretion on an attorney fee or cost award will not be disturbed on appeal unless there was an abuse of discretion. *See Nelson v. Peckham Plaza P'ships*, 110 Nev. 23, 26, 866 P.2d 1138, 1139–40 (1994) (whether to award attorney fees and the amount of an award will not be disturbed on appeal absent a manifest abuse of discretion); *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549 (2005) (courts must consider the *Brunzell* factors when determining the amount of fees to award, even though courts are granted a wide range of discretion in determining the amount).

There was no abuse of discretion here because the District Court carefully considered all relevant factual and legal issues. *See Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93–94, 787 P.2d 777, 780 (1990) (“A district court properly exercises its discretion where it gives appropriate, careful, correct and express consideration of the factual and legal circumstances before it.”). The lower court did not abuse its discretion in denying fees because it considered all relevant factual and legal issues before it including, but not limited to the Motion for Attorney fees, the Supplement, the Opposition and the oral argument.

While TKNR did prevail on its Motion for Summary Judgment, it did not file its motion for attorney's fees within the 21-day deadline mandated by Rule Nev. R. Civ. P 54(d)(2)(B)(i)(ii). TKNR had 21 days to file their motion for attorney fees to specify “the judgment and the statute, rule, or other grounds entitling the

movant to the award.” Nev. R. Civ. P 54(d)(2)(B)(i)(ii). Failure to file within the prescribed time period is fatal to a motion for fees. *See Barbara Ann Hollier Tr. v. Shack*, 131 Nev. 582, 587, 356 P.3d 1085, 1088 (2015). The TKNR Defendants filed a supplement to their original Motion for Attorney’s Fees approximately a year and a half after notice of the entry of judgment, which included mention of the Residential Purchase Agreement for the first time.

Given this, an appellate court should not reverse the District Court’s reasoned attorney fee decision on appeal. *See Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93-94, 787 P.2d at 777, 779 (1990) (“When reviewing a district court decision for abuse of discretion, the appellate court does not substitute its judgment for that of the district court.”).

CONCLUSION

For the reasons set forth above, it is clear that the District Court did not abuse its discretion when denying TKNR’s motion for attorney’s fees and cost. Therefore, the Court should deny the appeal.

KAEMPFER CROWELL



Lesley B. Miller, No. 7987
Elva A. Castaneda No. 15717
1980 Festival Plaza Drive, Suite 650
Las Vegas, Nevada 89135

Attorneys for Respondent
WLAB Investment, LLC

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point, Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 2766 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

KAEMPFER CROWELL



Lesley B. Miller, No. 7987
Elva A. Castaneda No. 15717
1980 Festival Plaza Drive, Suite 650
Las Vegas, Nevada 89135

Attorneys for Respondent
WLAB Investment, LLC

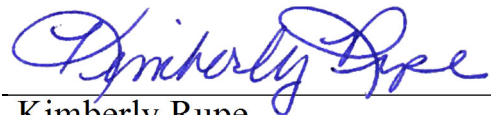
CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, I electronically filed the foregoing **RESPONDENT ANSWERING BRIEF** with the Clerk of the Court for the Supreme Court of the State of Nevada by using the electronic filing system to be delivered to the following registered user:

Michael B. Lee, Esq.
Michael Matthis, Esq.
Michael B. Lee, P.C.
1820 East Sahara Avenue, Suite 110
Las Vegas, Nevada 89104
mike@mblnv.com
matthis@mblnv.com

Attorneys for Appellant

DATED August 3, 2023



Kimberly Rupe
An employee of Kaempfer Crowell